

**Matter of Marshall v Horn**

2007 NY Slip Op 32542(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0100879/2007

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE  
*Justice*

PART 25

Curtis Marshall

INDEX NO. 100879/07

MOTION DATE 5/3/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 130

- v -

Martin Horn

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
AUG 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

AUG 03 2007

*YS*

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

-----X  
In the Matter of the Application of :  
CURTIS MARSHALL :

Petitioner,

: Index No.: 100879/07

: Cal. No.: 130 of 5/3/07

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

- against -

MARTIN HORN, Correction Commissioner of the  
New York City Department of Correction,  
THE NEW YORK CITY DEPARTMENT OF  
CORRECTION, and THE CITY OF NEW YORK

Respondents.

-----X  
DeGRASSE, J.:

**FILED**  
AUG 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioner Curtis Marshall seeks a judgment annulling the determination of respondents Martin Horn, as Correction Commissioner of the City of New York (the "Commissioner"), and the New York City Department of Correction ("DOC"), which terminated his employment as a correction officer. Petitioner seeks reinstatement, back pay, restored seniority and benefits. Respondents cross-move for an order dismissing the petition pursuant to CPLR 3211 (a) (7) and CPLR 7804 (f) for failure to state a cause of action.

Petitioner was appointed to the position of correction officer with DOC on December 16, 2004, subject to a two-year probationary term. Upon completion of four months of training, petitioner was assigned to the George R. Vierno Center ("the GRVC") on Rikers Island. While employed at GRVC, petitioner worked a steady tour in "the bing," a housing facility for inmates who

commit crimes while in jail. The petition alleges that while driving to work on the morning of July 2, 2006, petitioner stopped at a local bodega and bought a straight edge razor in order to make an opening inside the stitched area of the upper left side of his new regulation shirt so that he could affix his shield to the shirt. After using the razor, petitioner placed it in a small plastic container which he put in his gym bag. He then reported to work to begin his 7:00 a.m. to 3:00 p.m. tour of duty.

Upon entering the GRVC, petitioner placed his gym bag on the x-ray scanner and proceeded to walk through security. Officer Neal, the correction officer manning the security post, noticed the razor in petitioner's gym bag and instructed him to put it in the amnesty box outside. Petitioner assumed that Officer Neal was referring to the gun box located outside the front entrance which is used by the officers to unload their personal firearms before entering the GRVC. Petitioner walked over to the gun box, which had no sign or label on it, and placed the razor inside the box. Officer Neal, who had followed petitioner after noticing that he was headed in the wrong direction, informed petitioner that he had placed the razor in the wrong box. Following Officer Neal's instructions, petitioner retrieved the razor from the gun box and gave it to Officer Neal who then proceeded around the corner and dropped the razor in the amnesty box. Officer Neal informed petitioner that she would have to report the incident.

According to the petition, the amnesty box is used by individuals visiting inmates at the GRVC. It is further alleged that petitioner did not know about the amnesty box because he had never been assigned to a post in the visitors area. The following day, petitioner was removed from his post in "the bing" and assigned to the Intake Sally Port and the Kitchen Sally Port posts. On July 12, 2006, petitioner was placed on modified duty and assigned to the Transportation Division. Three months later, on October 2, 2006, petitioner was terminated from his position.

Petitioner then commenced this Article 78 proceeding by the filing of a notice of petition and verified petition on January 19, 2007, challenging DOC's determination that he be discharged on the grounds that DOC's actions were arbitrary, capricious and made in bad faith.

As a probationary employee at the time of the events in question, petitioner could be terminated for any or no reason, unless the dismissal was "in bad faith or for an improper or impermissible reason" (*Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). Judicial review of an administrative agency's decision to terminate a probationary employee is limited to ascertaining whether the action was taken in bad faith (*Matter of Garrison v Koehler*, 161 AD2d 322 [1990]; *Matter of King v Sapier*, 47 AD2d 114 [1976]).


Respondents now move to dismiss the petition, asserting in essence, that the petition fails to state a cause of action. A pre-answer motion to dismiss an Article 78 petition for failure to state a cause of action is tantamount to a demurrer, and such motion assumes the truth of the allegations contained in the petition and permits no consideration of facts alleged in support of the motion (*see Matter of Ostrowski v County of Erie*, 245 AD2d 1091 [1997]; *Hondzinski v County of Erie*, 64 AD2d 864 [1978]).

Petitioner asserts in his petition that DOC's decision to terminate him for mistakenly placing the razor in the gun box instead of the amnesty box lacked a rational basis because petitioner's "unfamiliarity with the amnesty box does not violate any rule or regulation and the only directive pertaining to amnesty boxes makes clear that it exists for individuals *visiting* the correction facilities." Inasmuch as the petition fails to "allege evidentiary facts suggesting that the dismissal was motivated by an improper purpose or bad faith," the petition must be dismissed for failure to state a cause of action (*Martinez v State Univ. of New York*, 294 AD2d 650, 651 [2002]).

Based upon the foregoing, the application is denied. Respondents' cross motion to dismiss the petition is granted. The Clerk shall enter judgment dismissing the petition.

This constitutes the decision, order and judgment of the court.

DATED:       AUG 03 2007

  
\_\_\_\_\_  
J.S.C.

**FILED**  
AUG 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE